

SUMMARY

MSTV and the Joint Commenters believe the Commission's allocation decision in the 4660-4685 MHz band is legally flawed in several respects and urge it to reconsider that allocation. By creating an unworkable and overbroad service class and proposing to auction off licenses within that class, the Commission has diverged sharply both from its past allocation methodology and from its allocation decisions in this very proceeding with respect to the two blocks of frequencies in the 2 GHz band. Specifically, the Commission has failed to discharge its spectrum allocation duty of determining which services will best use the spectrum and which are incompatible with such use. Moreover, the use of auctions in connection with an artificial aggregation of disparate services controverts the statutory mandate for assignment by auction and wrongly turns the auction methodology into an allocation tool. The Commission should change course by allocating the 4 GHz spectrum in the public interest for exclusive use by broadcast auxiliary operations. Such operations, harnessed to emerging advanced television technologies, will put the spectrum to its best use, foster new and enhance existing services, and further the goals of Congress in freeing this spectrum for private use.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
INTRODUCTION	2
I. A General Allocation to Fixed and Mobile Services in the 4 GHz Band is Unacceptably Broad . .	5
A. The Commission must allocate spectrum to specific services with identifiable characteristics	5
B. The Commission may make allocation decisions only partially, but not exclusively, on assessments of market forces	9
C. The GWCS allocation marks a striking and largely unexplained departure from the Commission's other allocation decisions in this proceeding	11
D. The record does not support the conclusion that the GWCS allocation is in the public interest .	13
II. The Commission's Proposed Broad Allocation of the 4 GHz Band and Tentative Designation of that Band as Auctionable are Unauthorized	15
A. The Commission may not craft a service class in order to generate revenues from competitive bidding	16
B. The Commission may not auction services that do not satisfy the competitive bidding criteria .	19
C. Congress intended to exclude from auction many of the potential 4 GHz uses . . .	23
CONCLUSION	25

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Allocation of)
Spectrum Below 5 GHz Transferred) ET Docket No. 94-32
from Federal Government Use)

**PETITION FOR RECONSIDERATION OF THE ASSOCIATION
FOR MAXIMUM SERVICE TELEVISION, INC. AND
OTHER MAJOR TELEVISION BROADCASTING ENTITIES**

The Association for Maximum Service Television, Inc. ("MSTV"), and the Association of America's Public Television Stations, Capital Cities/ABC, Inc.; CBS Inc.; the Fox Television Group of companies; the National Association of Broadcasters ("NAB"); National Broadcasting Company, Inc.; Public Broadcasting Service; and the Radio-Television News Directors Association ("RTNDA") (the "Joint Commenters") hereby urge the Commission to reconsider its allocation decision with respect to the 4660-4685 MHz band as set forth in the First Report and Order, ET Docket No. 94-32, released in the above captioned docket on February 17, 1995 (the "First R & O").^{1/}

1/ MSTV is a non-profit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality for the local broadcast system. NAB is a non-profit, incorporated association of radio and television stations and networks which serves and represents the American broadcast industry. RTNDA is a non-profit trade association of local and network news executives and editorial personnel, educators, students, and others devoted to electronic journalism. The other Joint Commenters include major television broadcasting networks and affiliates' organizations. MSTV, NAB, RTNDA and the other Joint

(continued...)

INTRODUCTION

Pursuant to the Omnibus Budget Reconciliation Act of 1993 ("OBRA")^{2/}, the Commission has undertaken to reallocate 200 megahertz of spectrum from federal government to non-federal government use. In February 1994, NTIA identified three frequency bands totalling 50 MHz of spectrum (2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz) for immediate reallocation.^{3/} In May 1994, the Commission released a Notice of Inquiry in this docket, requesting comment on the potential uses of the spectrum to be reallocated from government use.^{4/} The following November, it released a Notice of Proposed Rulemaking ("NPRM") proposing a broad allocation of the entire 50 MHz of spectrum to fixed and mobile services.^{5/} Intense opposition to that proposal resulted in the Commission's decision in the First R & O to

^{1/} (...continued)

Commenters have a longstanding and vital interest in maintaining the viability of free, universal, over-the-air television broadcasting, and are deeply concerned about the need for continued uninterrupted access to sufficient auxiliary broadcast spectrum.

^{2/} Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, 107 Stat. 312, August 10, 1993 (codified at 47 U.S.C. §§ 309(j) and 922 et seq).

^{3/} Preliminary Spectrum Reallocation Report, U.S. Department of Commerce, NTIA Special Publication 94-27, February 1994.

^{4/} In the Matter of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 9 FCC Rcd 2175 (1994) (NOI).

^{5/} In the Matter of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 9 FCC Rcd 6779 (1994) (NPRM).

allocate the 25 MHz available in the 2 GHz band to specific services.^{6/}

With respect the 25 MHz available in the 4660-4685 MHz band, the Commission rejected the requests of MSTV^{7/} and others^{8/} to allocate the spectrum to specific services. Instead, the First R & O adopted a broad allocation for fixed and mobile services on the grounds that "the public will receive the greatest benefit by [such an allocation], regardless of whether the ultimate use of this spectrum is for private services, non-subscriber services, or subscriber-based services." First R & O, at ¶ 41.^{9/} The Second Notice

^{6/} See First R & O, at ¶¶ 5 and 6. MSTV and the Joint Commenters have taken no position on the allocation of the frequencies in the 2 GHz band.

^{7/} See Comments of MSTV, ET Docket No. 94-32, June 13, 1995.

^{8/} See Comments of Alcatel Network Systems, ET Docket No. 94-32, at 3-4 (June 15, 1994) (microwave fixed links); Comments of the American Petroleum Industry, ET Docket No. 94-32, at 15 (June 15, 1994) (same); Comments of Loral/Qualcomm, ET Docket No. 94-32, at 6 (June 29, 1994) (MSS feeder links); Comments of Pacific Bell, ET Docket No. 94-32, at 5 (June 15, 1994) (TDD applications); Reply Comments of NABER, ET Docket No. 94-32, at 4 (June 30, 1994) (land mobile); Reply Comments of COMSAT, ET Docket No. 94-32, at 1-2 (June 30, 1994) (MSS feeder links).

^{9/} The Commission's decision with respect to this broad allocation appears somewhat tentative. In the Second Notice of Proposed Rule Making, released in the above captioned docket on February 17, 1995 ("Second Notice"), the Commission requested comment on "an alternative" allotment approach and "acknowledge[d] the possibility of better accommodating [user] needs by prescribing rules that provide for utilization of the 4660-4685 MHz frequency band only by specific services." Second Notice, at ¶ 62.

proposed to name this broad allocation the "General Wireless Communication Service" ("GWCS"). Second Notice, at ¶ 60.

The record is replete with evidence of why an exclusive allocation in the 4 GHz band to broadcast auxiliary operations ("BAS") would best serve the public interest. MSTV and the Joint Commenters in this proceeding^{10/} and elsewhere^{11/} have alerted the Commission to the existence of a severe shortage of existing spectrum available to support BAS. We also have demonstrated how this shortage is endangering the vital functions BAS supports such as news, sports, public affairs, and entertainment broadcasts. Finally we have explained that the successful introduction of digital television depends on an allocation of additional spectrum for BAS and that the 4 GHz spectrum is uniquely suited for BAS. In urging the Commission to reconsider its broad, non-specific allocation to fixed and mobile services, this petition for reconsideration incorporates by reference those arguments in

^{10/} See Comments of MSTV to the Notice of Inquiry, ET Docket No. 94-32 (June 15, 1994), Comments of MSTV and Other Major Television Broadcasting Entities to the NPRM, ET Docket No. 94-32, December 19, 1994, and Comments of MSTV and Other Major Television Broadcasting Entities to the Second Notice, ET Docket No. 94-32, March 21, 1995 ("Joint Comments II").

^{11/} See, e.g., Comments of MSTV, IC Docket No. 94-31, at 3-7 (July 19, 1994); Reply Comments of MSTV, ET Docket No. 94-31, at 1-3 (August 5, 1994); Comments filed in Amendment of the Commission Rules to Establish New Personal Communications Services, ET Docket No. 90-314; Comments filed in Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9.

favor of an exclusive allocation for BAS in the 4660-4685 MHz band.

Further, this petition urges modification of the Commission's approach in allocating the 4 GHz band because that approach is inconsistent with the Commission's statutory obligations under the Communications Act,^{12/} the National Telecommunications and Information Administration Organization Act,^{13/} and OBRA^{14/} insofar as it would create an over-broad service class, using auctions as an allocation tool, and either subjecting to competitive bidding services that Congress exempted from the Commission's auction authority or de facto precluding such services from enjoying the use of the band.^{15/}

I. A General Allocation to Fixed and Mobile Services in the 4 GHz Band is Unacceptably Broad.

A. The Commission must allocate spectrum to specific services with identifiable characteristics.

Congress has authorized the Commission to allocate radio spectrum "as public convenience, interest, or necessity requires." 47 U.S.C. § 303. Section 303 requires the Commission in allocating spectrum to "(a) [c]lassify radio stations; (b) [p]rescribe the nature of the service to be

^{12/} 47 U.S.C. § 303(a) - (c).

^{13/} 47 U.S.C. § 925(a).

^{14/} 47 U.S.C. § 309(j).

^{15/} These arguments were presented in part in the Joint Comments II, at 14-19 and Comments of MSTV and the Joint Commenters, ET Docket No. 94-32 (December 19, 1994), at 11-12.

rendered by each class of licensed stations . . . (c) [a]ssign bands of frequencies to the various classes of stations . . . " 47 U.S.C. §303(a)-(c). Pursuant to this authority, the Commission has until now prescribed fixed or mobile uses for each location on the electromagnetic spectrum. The First R & O abruptly changed this course by assigning a frequency band without defining the class of station or prescribing the type of service that may use that band.^{16/}

The First R & O concludes with little explanation that a broad allocation to an unidentified mix of fixed and mobile services satisfies the Commission's obligations under Section 303 and is in the public interest. See First R & O, at ¶ 48. As a threshold matter, without respect to the validity of the Commission's particular public interest assessments, an allocation as broad as the GWCS is inconsistent with the Commission's statutory duty to allocate spectrum to specific services. The GWCS would open up the 25 MHz of spectrum to a miscellany of services with vastly different and mutually incompatible interference characteristics, operational modes, spectrum needs, and service traits, ranging from subscriber-based interactive

^{16/} The "nature of the service" to be rendered in the proposed GWCS is virtually any transmission of radio frequency -- one-way or two-way, mobile or fixed, private or commercial, for pay or not. The First R & O, at ¶ 44, concludes that the Communications Act gives the Commission unlimited discretion in prescribing a service, presumably allowing even the most general "prescriptions." If so, Section 303(b) would serve little purpose as there would be no point in "prescribing" a service nearly coextensive with all possible services.

video and data to non-subscriber-based mobile and fixed broadcast auxiliary to public safety to private fixed microwave to commercial roving aeronautical audio and video services. An allocation to such an array of services is an allocation in name only because the service class nearly swallows the universe of uses from which it was ostensibly carved. Such an all-purpose allocation is effectively a no-purpose allocation.^{17/}

The Commission has before confronted the tension between its statutory obligations to specify spectrum uses and the potential benefits of flexible allocations. Flexible approaches have held sway only when there was flexibility as to a mutually compatible range of consumer applications, not inconsistent operational modes and fundamental technical characteristics. For example, the Commission selected a flexible approach in deciding to allow market forces to determine which common carrier services are offered on two-way public land mobile channels.^{18/} There, the flexibility

^{17/} The First R & O notes that broadcast services, radiolocation services, and satellite services are excluded from the GWCS. Id. at ¶ 46. The fact that these exclusions are so few in comparison with the great number of possible uses of the spectrum highlights just how extremely broad the fixed and mobile allocation is. To the extent that the Commission has effectively failed to allocate frequencies in this proceeding, it will not comply with 47 U.S.C. § 925(a) which requires allocation of immediately available NTIA spectrum by a date certain.

^{18/} In the Matter of Flexible Allocation of Frequencies in the Domestic Public Land Mobile Service For Paging and Other Services, 2 FCC Rcd. 2795 (1987) (NPRM).

proposed was far more limited than that which is proposed for the 4 GHz band. Even so, Commissioner James H. Quello commented that "'[f]lexible allocation' is a concept that is, at best, oxymoronic" and noted that it seemed to circumvent the Commission's obligation to allocate spectrum for specific uses.^{19/} Indeed, Congress expressed concern that this flexible allocation scheme ran counter to the Communications Act:

the Commission's proposal . . . that applicants for different services . . . compete for the same spectrum under a system of random selection amounts to the allocation of spectrum by lottery and is not authorized by law. The Communications Act requires the Commission to award spectrum by making discrete allocations of spectrum to each service as the public interest requires.^{20/}

In response to Commissioner Quello's reservations and the congressional caveat, the Commission defended a flexible allocation approach on the grounds that:

the term 'flexible allocation' does not describe a situation in which different service categories must compete for the same frequencies. Rather, it is descriptive of the fact that mobile common carrier frequency allocations are now available for a variety of common carrier services . . . we hold that mobile commercial service is one classification, and we find that it is not just or reasonable to subdivide the class into categories

^{19/} Id. at 2802 (concurring statement of Commissioner James H. Quello).

^{20/} S. Rep. No. 301, 99th Cong., 2d Sess., at 34 (1986) (emphasis added) (quoted in In the Matter of Flexible Allocation of Frequencies in the Domestic Public Land Mobile Service For Paging and Other Services, 2 FCC Rcd. 2795, 2802 (1987) (concurring statement of Commissioner James H. Quello)).

based on technological description or consumer application.^{21/}

An allocation of the 4 GHz band for fixed and mobile services would present the very conundrum that the Commission avoided in the land mobile allocation. That is, users in different service categories, distinguished by far more than their mere consumer applications, would be forced to compete for the same frequencies to the detriment of the public interest in efficient service and spectrum use.

B. The Commission may make allocation decisions only partially, but not exclusively, on assessments of market forces.

Although market forces are a permissible consideration when allocating spectrum, the Commission may not altogether abandon to the market its statutory obligation to select among competing users and define service classes with some degree of specificity. The distinction between appropriate deference to user demand and abdication of regulatory responsibility is illustrated by the prime example the First R & O uses to justify the broad GWCS allocation. See First R & O, at ¶ 45.

In the General Purpose Mobile Service ("GPMS") proceeding, the Commission created a new class of related services to afford "licensees broad discretion to offer a multiplicity of services based upon the particular demands of

^{21/} In the Matter of Flexible Allocation of Frequencies in the Domestic Public Land Mobile Service for Paging and Other Services, 4 FCC Rcd. 1576, 1580 (1989) (First Report and Order) (emphasis added).

their markets or communities."^{22/} As opposed to the broad fixed and mobile allocation proposed here, the GPMS was limited to uses of closely allied mobile (land, maritime, and aeronautical) services^{23/} operating within 2 MHz of spectrum.

Moreover, the precedent cited in support of the GPMS allocation involved the grant of limited flexibility to licensees of a single type of technology to determine what services to offer.^{24/} Never before has the Commission done what it proposes to do with the GWCS allocation -- that is, create a free-for-all in which different species (not merely different breeds) of mutually incompatible services vie for

^{22/} See Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 2 FCC Rcd 1825, 1839 (1986).

^{23/} The Commission has consistently supported the blurring of distinctions among closely related but separately defined services so as, for example, to group allocations for maritime mobile satellite under the broader class of mobile-satellite. See, e.g., In re Preparations for International Telecommunication Union world Radiocommunication Conferences, 9 FCC Rcd. 2430 (1994) (NOI). However, the blurring of distinctions between subscription-based fixed point-to-multipoint services on the one hand and non-subscription-based mobile point-to-point services on the other goes much farther in collapsing distinctions between modes as well as loci of operation.

^{24/} See Id. at 1839. The examples cited were In re Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellite, 90 FCC 2d 676 (1982), aff'd. National Ass'n. of Broadcasters v. FCC, 740 F.2d 1190 (1984) (adopting a flexible regulatory approach for DBS systems during an interim experimental period with respect to, inter alia, ownership and programming rules) and In re Amendment of Parts 2 and 73 of the Commission's Rules Concerning the Use of Subsidiary Communications Authorizations, 53 RR 2d 1519 (1983) (allowing radio broadcasters to deliver non-broadcast services over FM subchannels).

the same frequencies without attention to the public interest, convenience, or necessity in allocating spectrum among the various services.^{25/}

C. The GWCS allocation marks a striking and largely unexplained departure from the Commission's other allocation decisions in this proceeding.

In addition to diverging from past allocation practice in other proceedings (discussed above), the GWCS allocation marks a stark and unexplained departure from the other allocation decisions in this very proceeding. The Commission apparently discharged its allocation responsibilities with respect to the 2390-2400 MHz and 2402-2417 MHz bands by determining what spectrum uses best served the public and excluding incompatible uses. In contrast and without reason, the First R & O failed to make these determinations with respect to the 4 GHz band.

The Commission initially proposed to allocate broadly all three available NTIA bands for general fixed and mobile services and to assign the entire 50 MHz of spectrum through competitive bidding to the extent possible.^{26/} However, the majority of commenters opposed the flexible allocation scheme and proposed specific uses for all three

^{25/} The Commission has done little to explain its abrupt change of policy. In such circumstances, the Commission may not lawfully implement its new policy. See Motor Vehicle Manufacturers Ass'n, Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 41-43 (1983); Greater Boston Telephone Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. den., 403 U.S. 923 (1971).

^{26/} See NPRM, 9 FCC Rcd at 6780.

frequency bands. In response, the Commission withdrew its proposed general allocation for the two 2 GHz bands. The First R & O allocated the 2390-2400 MHz band for shared use between unlicensed PCS devices and the Amateur service based on the Commission's commitment "to ensuring the successful implementation of [PCS] services"; the fact that unlicensed devices "have the potential to offer a portable 'on-ramp' to the information highway that will be accessible to everyone"; and the fact that the spectrum "provides a unique opportunity to provide for these devices." First R & O, at ¶ 16. After determining the proper use for the spectrum, the First R & O rejected incompatible uses. See Id., at ¶¶ 18-22. Similarly, with respect to the 2402-2417 MHz band, the Commission abandoned its proposed broad allocation in favor of a specific allocation in the public interest for Part 15 devices and the Amateur service. See First R & O, at ¶ 32. The First R & O then rejected other proposed uses as incompatible. See Id., at ¶ 35.

It is only with respect to the 4 GHz band that the First R & O rejected the proposals for specific spectrum uses, declined to determine which particular services best served the public, and declined to exclude incompatible uses. The First R & O offers no rationale for why the same process of identifying the most worthy services and excluding incompatible ones was not applied to the 4 GHz band. The disparate treatment of the 2 GHz and 4 GHz bands is

particularly striking in view of the fact that an allocation for BAS operations in the 4 GHz band is desirable for many of the same reasons supporting the 2390-2400 MHz band allocation for unlicensed PCS. Like unlicensed PCS, BAS operations support a critical new technology and provide universal (not just broad) access to information. As the 2 GHz band did for unlicensed PCS, the 4 GHz band offers the Commission a unique opportunity to provide for critical BAS operations.

D. The record does not support the conclusion that the GWCS allocation is in the public interest.

Even if the Commission had the authority to allocate spectrum as generally as entailed by the GWCS definition, the record does not support the conclusion that such an allocation serves the public interest. To be sure, the determination of whether a particular allocation is in the public interest is largely within the Commission's discretion. See First R & O, at ¶ 44; FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1980). However, that discretionary decision and public interest determination must be supported by the record. See Greater Boston Telephone Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. den., 403 U.S. 923 (1971).

Here, the general allocation rests on a number of assumptions for which there is little or no record support. For example, it is assumed that the dictates of user demand (in terms of the amount a potential user is willing to pay for the spectrum) alone properly can serve as a proxy for a public

interest determination by the Commission^{27/} and that the ultimate mix of fixed and mobile services in the 4 GHz band will accurately reflect such demand.^{28/}

The First R & O also assumes that the mix of uses contemplated by the broad GWCS is technically feasible. Comments filed in response to the Second Notice, largely reiterating comments responding to the first NPRM, reveal that the proposed uses are substantially incompatible. Among the proposals for the spectrum are those for: 800 KHz channels for private fixed point-to-point microwave systems;^{29/} five MHz channels totalling no more than 10 MHz licensed within small geographic areas for wireless cable with two channels

^{27/} Although the Commission has a continuing responsibility to accommodate the evolving demands of the marketplace, certain valuable public goods are not necessarily or immediately reflected in the consumer demand. See, e.g., Comments of APCO, ET Docket No. 94-32 (December 19, 1994), at 7-10.

^{28/} Consumer valuations of the licensees' services are not always reflected in the licensees' bottom line. Consumer preferences affect a broadcaster's willingness to pay for spectrum only indirectly through the measure of viewer ratings which are then funnelled through advertising revenues to the broadcaster's decision-making. See In re Amendment of the commission's Rules With Regard to the Establishment and Regulation of New Digital Audio radio Services, Gen. Docket No. 90-357 (January 25, 1991) (Comment of the Staff of the Federal Trade Commission). A broadcast auxiliary operator's valuation of the spectrum is even farther removed from consumer preference in that it responds to the television broadcaster's demands. In addition, because much of the BAS service is news-related, public interest considerations as well as consumer preference should inform the allocation of spectrum for BAS operations.

^{29/} See Comments of the American Petroleum Institute, ET Docket No. 94-32 (March 20, 1995), at 11.

set aside for wireless cable operations;^{30/} and six MHz channels licensed nationally on a shared basis for broadcast auxiliary services. See Joint Comments II, at 19-21. Each of these uses would require technical rules and interference protection unique to it. A channelization plan selected because it is appropriate for one type of use would result in channels that are too large (thus, wasted spectrum) and/or too small (thus, inadequate service) for other uses. A plan of very small bandwidth channels or small service areas devised to permit aggregation and expansion may produce holdouts and spectrum gaps that would cripple such services as BAS. See Id., at 9-11, 19-21.

II. The Commission's Proposed Broad Allocation of the 4 GHz Band and Tentative Designation of that Band as Auctionable are Unauthorized.

The First R & O asserts that assigning the 4 GHz band of frequency to fixed and mobile services generally, rather than to one or more definite service classes as the Commission did with the 2 GHz spectrum blocks, will ensure that the spectrum is allocated to "services that are most highly valued by the licensees and/or their customers." First

^{30/} See Comments of American Telecasting, Inc., ET Docket No. 94-32 (March 20, 1995), at 2-4; Comments of Wireless Cable Association International, Inc., ET Docket No. 94-32 (March 20, 1995), at 5-7; and Comments of LEACO, ET Docket No. 94-32 (March 20, 1995), at 10 (requesting aggregations of up to 15 MHz). American Telecasting does not support the broad allocation to fixed and mobile services. Notably, the request of WCAI, which ostensibly does support the broad allocation, to reserve certain portions of the spectrum apparently qualifies its support and suggests that such a broad allocation is unworkable.

R & O, at ¶ 48. In connection with this assessment, the Commission has preliminarily concluded that the services to be provided in the GWCS will meet the statutory criteria for competitive bidding and has proposed to use auctions as an assignment mechanism. See First R & O, at ¶ 50. Because the Commission may not use its auction authority as an allocation tool and may not subject to auction services that Congress has exempted from competitive bidding, the Commission cannot auction the entire band broadly allocated to fixed and mobile services.

Congress drafted the auction statute narrowly to avoid its use (a) to allocate spectrum, and (b) to assign spectrum to uses that are not well-adapted to auction, i.e., that are not mutually exclusive or are not subscriber-based. Although spectrum auctions have proven effective for certain uses, the Commission cannot and should not allow that success alone to influence the allocation of the 4 GHz spectrum, when there are other public interest considerations to be addressed as well.

A. The Commission may not craft a service class in order to generate revenues from competitive bidding.

Of the many uses proposed for the 4 GHz band, only a very few actually meet the competitive bidding criteria.^{31/}

^{31/} To confirm this preliminary conclusion, the Second Notice requested further comment on uses to which the 4 GHz band would be put. The ensuing comments suggest, contrary to the preliminary conclusion in the First R & O, that the principal use will not be for subscriber-based services. Of the seven
(continued...)

Thus, it is far from clear that the very broad service class proposed in the GWCS could be subject to auctions even under the reasoning of the First R & O. Nevertheless, the tentative conclusion that otherwise exempt spectrum uses become auctionable once aggregated in a service class with auctionable services is flawed. To the extent that the artificially large service class groups together distinct services, potentially subjecting all uses of the spectrum to auctions because of the characteristics of some, the broad classification uses the prospect of auctions to allocate spectrum to a mix of likely incompatible uses. In this way, the Commission's auction authority effectively functions as a tool to allocate spectrum in violation of 47 U.S.C. § 309(j). On the other hand, the decision to subject the band to auction can also be regarded as precluding non-auction eligible uses, although the Commission has made no finding that such uses are not in the public interest.

Congress expressly forbade the Commission to allocate spectrum with a view to garnering auction revenues. The auction legislation provides that, "in making a decision .

^{31/} (...continued)

commenters proposing uses for the 4 GHz band in response to the Second Notice, only three proposed the single subscriber-based use of wireless cable. Moreover, in terms of the principal use criteria of "throughput, time, or spectrum", proposed broadcast auxiliary non-subscription use exceeds that of the proposed subscription uses of the spectrum. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (Second Report and Order) 9 FCC Rcd 2348, 2354 (1994) ("Competitive Bidding Second Report and Order").

. . to assign a band of frequencies to [an auction-eligible] use . . . the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection." 47 U.S.C. § 309(j)(7)(A).

The House Committee initially reporting the spectrum-auction bill stated that,

the FCC cannot base an allocation decision . . . solely or predominantly on the expectation of more revenues. The Committee intends the FCC to make its decisions based on sound communications policy pursuant to the Communications Act. The Commission is not a collection agency of the U.S. Government, and should not be influenced by budgetary considerations. This paragraph is designed to insulate the FCC's communications policy decisions from budgetary pressures, and clarifies that important communications policy objectives should not be sacrificed in the interest of maximizing revenues from auctions.^{32/}

When introducing an earlier version of the legislation, Senator Inouye expressed the same concern that the auction authority not replace the Commission's traditional allocation methodologies,

This proposal does not . . . allow auctions to be used to allocate frequencies among different service categories. Frequency allocation decisions must continue to be made by the FCC, not by the private marketplace. But this amendment would allow the FCC

^{32/} H. Rep. 111, 103d Cong., 2d Sess. 258 (1993). See also Committee on the Budget, S. Print 36, 103d Cong. 1st Sess. 65, 72 (1993) ("The FCC is not permitted to consider potential revenues from auctions in allocating spectrum for a general use Potential revenues from competitive bidding are not to affect the FCC's decisions to allocate spectrum.")

to use auctions to assign licenses to particular users.^{33/}

In giving the Commission auction authority, Congress determined that the Commission may use spectrum auctions only to assign spectrum as between mutually exclusive providers of subscriber-based services, not to allocate spectrum among diverse services artificially grouped in a class like the GWCS that includes auction-exempt services as well. The auction methodology is a delicate tool designed to distribute licenses among like users of dedicated spectrum. It would be a practical, as well as legal, mistake to use such a tool at the more general level at which the Commission must perform its management function by at least broadly dedicating spectrum to appropriate uses, as it has done in the case of the 2 GHz spectrum at issue in this proceeding.

B. The Commission may not auction services that do not satisfy the competitive bidding criteria.

The Commission may not auction spectrum until it determines that " . . . mutually exclusive applications are accepted for filing",^{34/} and that " . . . the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from

^{33/} 139 Cong. Rec. S1438 (daily ed. Feb. 4, 1993) (statement of Sen. Inouye).

^{34/} 47 U.S.C. § 309(j)(1).

subscribers"35/ Recognizing that many of the proposed uses for the 4 GHz band would not meet the above stated auction criteria on their own, the First R & O suggests that services offered under the broad GWCS umbrella may be auctioned because the "principal use" of the spectrum will likely be for subscriber-based services. Interpreting the term "principal use" in this fashion subverts the auction criteria by rendering all services auctionable provided that they are grouped together in a general service category wedding subscription and non-subscription uses.

Congress reveals a very different understanding of the term "principal use" in the legislative history. It used "principal use" to refer to the use to which a particular licensee would put the spectrum, not to the group of uses to which fixed and mobile service providers would put the spectrum. Thus, the Conference Agreement framed the "principal use" issue in terms of the uses made by a given licensee:

competitive bidding procedures would be utilized for a limited number of licensees. These procedures will only be utilized when the Commission accepts for filing mutually exclusive applications for a license, and the Commission has determined that the principal use of that license will be to offer service in return for compensation from subscribers.

^{35/} 47 U.S.C. § 309 (j)(2)(A). This language emerged from the Conference where it was decided to restrict competitive bidding to a limited number of types of licenses. See H. Rep. 213, 103d Cong., 1st Sess. 481 (1993).

H. Rep. 213, 103d Cong., 1st Sess. 481 (1993) (emphasis added).^{36/}

The Commission's interpretation of the auction statute has heretofore been consistent with the statute. In the Competitive Bidding Second Report and Order,^{37/} the Commission elaborated a "majority use" test to determine when a given service class would be subject to spectrum auctions. In harmony with the Conference language quoted above, the Commission addressed the situation in which a single licensee may "provide service both to itself and to subscribers."^{38/} The "mixed-use" was undertaken by a single licensee and not among various licensees offering discrete services.^{39/} In this proceeding, the Commission's creation of a super-service class and subsequent derivation of the "principal use" of that GWCS from among the distinct licensee uses would be contrary to Congressional intent.

In addition to failing to satisfy the subscriber-based criterion, many uses of the 4 GHz spectrum, such as

^{36/} See also H. Rep. 111, 103d Cong., 2d Sess. 253 (1993) (where the Commission determines that the principal use of the spectrum " . . . will be to, in essence, resell the spectrum to subscribers, and the Commission determines that an auction will meet the objectives in section 309(j)(3), then that class of licenses should be subject to competitive bidding.").

^{37/} See 9 FCC Rcd 2348 (1994).

^{38/} Id. at 2353. The Competitive Bidding Second Report and Order illustrated this situation with the Private Operational Fixed Service which, unlike the proposed GWCS, is dedicated to fixed uses only.

^{39/} See Joint Comments II at 15-18.

broadcast auxiliary, do not satisfy the mutual exclusivity requirement under 47 U.S.C. § 309(j)(1). Broadcast auxiliary users currently share spectrum in a coordinated manner among like-users. Pursuant to the auction legislation, the Commission has excluded "from competitive bidding those classes of services where mutual exclusivity between applications cannot exist because channels must be shared by multiple licensees." Competitive Bidding Second Report and Order, at 2351.

The implementation of the GWCS might in fact render BAS licensees mutually exclusive simply because they have been grouped with incompatible services under a broad umbrella service class. Such forced mutual exclusivity is, however, a potentially wasteful means of allocating spectrum. Congress has acknowledged that mutual exclusivity is often an impediment to efficient allocation and has encouraged the Commission to avoid mutually exclusive use of licenses: "The licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so." H.R. Rep. 111, 103d Cong., 2d Sess. 258 (1993).^{40/}

^{40/} This decision to discourage mutual exclusivity in connection with spectrum auctions was likely based in part on the following policy rationale:

Economic efficiency is sacrificed if the political system were to introduce an explicit revenue goal
(continued...)